

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ELIZABETH L. FISHER,)	
)	No. CV-09-381-CI
Plaintiff,)	
)	
v.)	ORDER GRANTING PLAINTIFF'S
)	MOTION FOR SUMMARY JUDGMENT
MICHAEL J. ASTRUE,)	AND REMANDING FOR ADDITIONAL
Commissioner of Social)	PROCEEDINGS PURSUANT TO
Security,)	SENTENCE FOUR 42 U.S.C. §
)	405(g)
Defendant.)	
)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 13, 15.) Attorney Rebecca M. Coufal represents Plaintiff; Special Assistant United States Attorney Leisa A. Wolf represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and **DENIES** Defendant's Motion for Summary Judgment.

JURISDICTION

Plaintiff Elizabeth L. Fisher (Plaintiff) protectively filed for supplemental security income (SSI) on May 25, 2007. (Tr. 111, 176.) Plaintiff alleged an onset date of March 23, 2002.¹ (Tr. 111.)

¹At the hearing, the ALJ noted a previous application was filed on December 5, 2005, and indicated a willingness to reopen the prior

1 Benefits were denied initially and on reconsideration. (Tr. 67, 73.)
2 Plaintiff requested a hearing before an administrative law judge
3 (ALJ), which was held before ALJ R.J. Payne on February 3, 2009. (Tr.
4 25-64.) Plaintiff was represented by counsel and testified at the
5 hearing. (Tr. 45-63.) Medical experts David R. Rullman, M.D., and
6 Ronald M. Klein, Ph.D., also testified. (Tr. 27-45.) The ALJ denied
7 benefits (Tr. 11-21) and the Appeals Council denied review. (Tr. 1.)
8 The instant matter is before this court pursuant to 42 U.S.C. §
9 405(g).

10 **STATEMENT OF FACTS**

11 The facts of the case are set forth in the administrative record
12 and will, therefore, only be summarized here.

13 Plaintiff was born February 15, 1960, making her 48 years old at
14 the time of the hearing. (Tr. 111.) Plaintiff dropped out of school
15 in the eleventh grade but later obtained her high school diploma.
16 (Tr. 41.) Plaintiff has work experience as a food service manager and
17 a van driver and dispatcher. (Tr. 130.) Plaintiff claims fibromyalgia,
18 celiac sprue, panic disorder, arthritis, agoraphobia and blood clots
19 limit her ability to work. (Tr. 45-47, 129.)

20 **STANDARD OF REVIEW**

21 Congress has provided a limited scope of judicial review of a
22 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold the
23 Commissioner's decision, made through an ALJ, when the determination

24 _____
25 application. (Tr. 26-27.) Plaintiff amended the onset date to
26 December 15, 2005. (Tr. 27.) Under Title XVI, SSI benefits are not
27 payable before the date of application. 20 C.F.R. §§ 416.305,
28 416.330(a); S.S.R. 83-20.

1 is not based on legal error and is supported by substantial evidence.
2 See *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985); *Tackett v.*
3 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). "The [Commissioner's]
4 determination that a claimant is not disabled will be upheld if the
5 findings of fact are supported by substantial evidence." *Delgado v.*
6 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)).
7 Substantial evidence is more than a mere scintilla, *Sorenson v.*
8 *Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less than a
9 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir.
10 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
11 573, 576 (9th Cir. 1988). Substantial evidence "means such relevant
12 evidence as a reasonable mind might accept as adequate to support a
13 conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
14 (citations omitted). "[S]uch inferences and conclusions as the
15 [Commissioner] may reasonably draw from the evidence" will also be
16 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
17 review, the court considers the record as a whole, not just the
18 evidence supporting the decision of the Commissioner. *Weetman v.*
19 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*,
20 648 F.2d 525, 526 (9th Cir. 1980)).

21 It is the role of the trier of fact, not this court, to resolve
22 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
23 supports more than one rational interpretation, the court may not
24 substitute its judgment for that of the Commissioner. *Tackett*, 180
25 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
26 Nevertheless, a decision supported by substantial evidence will still
27 be set aside if the proper legal standards were not applied in
28

1 weighing the evidence and making the decision. *Browner v. Sec'y of*
2 *Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). Thus,
3 if there is substantial evidence to support the administrative
4 findings, or if there is conflicting evidence that will support a
5 finding of either disability or nondisability, the finding of the
6 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
7 1230 (9th Cir. 1987).

8 SEQUENTIAL PROCESS

9 The Social Security Act (the "Act") defines "disability" as the
10 "inability to engage in any substantial gainful activity by reason of
11 any medically determinable physical or mental impairment which can be
12 expected to result in death or which has lasted or can be expected to
13 last for a continuous period of not less than twelve months." 42
14 U.S.C. §§ 423 (d)(1)(A), 1382c (a)(3)(A). The Act also provides that
15 a Plaintiff shall be determined to be under a disability only if his
16 impairments are of such severity that Plaintiff is not only unable to
17 do his previous work but cannot, considering Plaintiff's age,
18 education and work experiences, engage in any other substantial
19 gainful work which exists in the national economy. 42 U.S.C. §§
20 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability
21 consists of both medical and vocational components. *Edlund v.*
22 *Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

23 The Commissioner has established a five-step sequential
24 evaluation process for determining whether a claimant is disabled. 20
25 C.F.R. §§ 404.1520, 416.920. Step one determines if he or she is
26 engaged in substantial gainful activities. If the claimant is engaged
27 in substantial gainful activities, benefits are denied. 20 C.F.R. §§
28

1 404.1520(a)(4)(I), 416.920(a)(4)(I).

2 If the claimant is not engaged in substantial gainful activities,
3 the decision maker proceeds to step two and determines whether the
4 claimant has a medically severe impairment or combination of
5 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If
6 the claimant does not have a severe impairment or combination of
7 impairments, the disability claim is denied.

8 If the impairment is severe, the evaluation proceeds to the third
9 step, which compares the claimant's impairment with a number of listed
10 impairments acknowledged by the Commissioner to be so severe as to
11 preclude substantial gainful activity. 20 C.F.R. §§
12 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404, Subpt. P, App.
13 1. If the impairment meets or equals one of the listed impairments,
14 the claimant is conclusively presumed to be disabled.

15 If the impairment is not one conclusively presumed to be
16 disabling, the evaluation proceeds to the fourth step, which
17 determines whether the impairment prevents the claimant from
18 performing work he or she has performed in the past. If plaintiff is
19 able to perform his or her previous work, the claimant is not
20 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
21 this step, the claimant's residual functional capacity ("RFC")
22 assessment is considered.

23 If the claimant cannot perform this work, the fifth and final
24 step in the process determines whether the claimant is able to perform
25 other work in the national economy in view of his or her residual
26 functional capacity and age, education and past work experience. 20
27 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482

1 U.S. 137 (1987).

2 The initial burden of proof rests upon the claimant to establish
3 a *prima facie* case of entitlement to disability benefits. *Rhinehart*
4 *v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d
5 1111, 1113 (9th Cir. 1999). The initial burden is met once the
6 claimant establishes that a physical or mental impairment prevents him
7 from engaging in his or her previous occupation. The burden then
8 shifts, at step five, to the Commissioner to show that (1) the
9 claimant can perform other substantial gainful activity, and (2) a
10 "significant number of jobs exist in the national economy" which the
11 claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir.
12 1984).

13 ALJ'S FINDINGS

14 At step one of the sequential evaluation process, the ALJ found
15 Plaintiff has not engaged in substantial gainful activity since May
16 25, 2007. (Tr. 13.) At step two, he found Plaintiff has the
17 following severe impairment: fibromyalgia. (Tr. 13.) At step three,
18 the ALJ found Plaintiff does not have an impairment or combination of
19 impairments that meets or medically equals one of the listed
20 impairments in 20 C.F.R. Part 404, Subpt. P, App. 1. (Tr. 16.) The
21 ALJ then determined "the claimant has the residual functional capacity
22 to perform a full range of light work. The claimant can lift or carry
23 20 pounds occasionally and frequently lift or carry 10 pounds. The
24 claimant can sit for six hours and stand or walk for six hours in an
25 eight-hour workday." (Tr. 16.) At step four, the ALJ found Plaintiff
26 is unable to perform any past relevant work. (Tr. 19.) After taking
27 into account Plaintiff's age, education, work experience, and residual
28 functional capacity, the ALJ found that there are a significant number

1 of jobs in the national economy that the Plaintiff can perform. (Tr.
2 20.) Thus, the ALJ concluded Plaintiff has not been under a
3 disability as defined in the Social Security Act since May 25, 2007,
4 the date the application was filed. (Tr. 20.)

5 ISSUES

6 The question is whether the ALJ's decision is supported by
7 substantial evidence and free of legal error. Specifically, Plaintiff
8 argues the ALJ: (1) erred at step two by finding fibromyalgia is
9 Plaintiff's only severe impairment; (2) failed to fully and fairly
10 develop the record; (3) failed to consider lay witness testimony; and
11 (4) improperly relied on the grids at step five. (Ct. Rec. 14 at 11-
12 20.) Defendant argues the ALJ: (1) made a proper step two finding;
13 (2) fully developed the record; (3) properly limited lay witness
14 testimony at the hearing; and (4) made a step five finding supported
15 by substantial evidence. (Ct. Rec. 16 at 2-12.)

16 DISCUSSION

17 1. Lay Witness Testimony

18 Plaintiff argues the ALJ erred by failing to consider lay witness
19 testimony. (Ct. Rec. 14 at 15-17.) An ALJ must consider the
20 testimony of lay witnesses in determining whether a claimant is
21 disabled. *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2007); *Stout*
22 *v. Commissioner of Social Security*, 454 F.3d 1050, 1053 (9th Cir.
23 2006). Lay witness testimony regarding a claimant's symptoms or how
24 an impairment affects ability to work is competent evidence and cannot
25 be disregarded without comment. *Nguyen v. Chater*, 100 F.3d 1462, 1467
26 (9th Cir, 1996). If lay testimony is rejected, the ALJ "must give
27 reasons that are germane to each witness." *Id.* In this case, the ALJ
28 refused to allow lay witness testimony at the hearing and failed to

1 address evidence offered as an alternative to testimony.

2 Plaintiff's friend, Lee Godwin, came to the hearing and Plaintiff
3 wanted her to testify. (Tr. 25.) At the end of the hearing, the ALJ
4 stated, "I don't have time today for Ms. Godwin's testimony, but I'll
5 certainly give you 20 days to get me her affidavit and we'll consider
6 that." (Tr. 63.) Plaintiff's counsel objected and the ALJ reiterated
7 that time constraints were the basis for his decision not to allow Ms.
8 Godwin to testify. (Tr. 63.) On February 24, 2009, within 20 days of
9 the hearing, Ms. Godwin executed an affidavit describing her
10 observations of Plaintiff's condition. (Tr. 185-86.) The ALJ did not
11 mention Ms. Godwin's affidavit in the opinion or discuss any lay
12 witness evidence. The ALJ's failure to address Ms. Godwin's affidavit
13 was error.

14 Defendant argues the error should be dismissed as harmless error.
15 (Ct. Rec. 16 at 10.) In *Stout v. Comm'r, Soc. Sec. Admin.*, the 9th
16 Circuit held, "where the ALJ's error lies in a failure to properly
17 discuss competent lay testimony favorable to the claimant, a reviewing
18 court cannot consider the error harmless unless it can confidently
19 conclude that no reasonable ALJ, when fully crediting the testimony,
20 could have reached a different disability determination." 54 F.3d
21 1050, 1056 (9th Cir. 2006). Ms. Godwin's affidavit includes statements
22 which support Plaintiff's testimony regarding her limitations,
23 including observations about limitations on activities of daily
24 living, constant pain and limited mobility. In this case, where the
25 ALJ declined to accept testimony from Plaintiff's friend for the sole
26 reason that it would affect the scheduling of other cases, it was
27 particularly important that the ALJ consider Ms. Godwin's affidavit in
28 lieu of testimony. The court cannot confidently conclude that if Ms.

1 Godwin's testimony were credited, no reasonable ALJ could have reached
2 a different disability determination. As such, the error is not
3 harmless and the matter must be remanded for proper consideration of
4 Ms. Godwin's affidavit.

5 **2. Duty to Develop the Record**

6 Plaintiff argues the ALJ failed to meet his duty to develop the
7 record at step three. (Ct. Rec. 14 at 9-10.) In Social Security
8 cases, the ALJ has a special duty to develop the record fully and
9 fairly and to ensure that the claimant's interests are considered,
10 even when the claimant is represented by counsel. *Tonapetyan v.*
11 *Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001); *Brown v. Heckler*, 713
12 F.2d 441, 443 (9th Cir.1983). The regulations provide that the ALJ
13 may attempt to obtain additional evidence when the evidence as a whole
14 is insufficient to make a disability determination, or if after
15 weighing the evidence the ALJ cannot make a disability determination.
16 20 C.F.R. § 404.1527(c)(3); *see also* 20 C.F.R. § 404.1519a. Ambiguous
17 evidence, or the ALJ's own finding that the record is inadequate to
18 allow for proper evaluation of the evidence, triggers the ALJ's duty
19 to "conduct an appropriate inquiry." *Smolen v. Chater*, 80 F.3d 1273,
20 1288 (9th Cir. 1996); *Armstrong v. Comm'r of Soc. Sec. Admin.*, 160 F.3d
21 587, 590 (9th Cir. 1998). An ALJ's duty to develop the record further
22 is triggered only when there is ambiguous evidence or when the record
23 is inadequate to allow for proper evaluation of the evidence.
24 *Tonapetyan*, 242 F.3d at 1150.

25 Plaintiff argues the ALJ should have attempted to obtain a
26 psychological evaluation from Dr. Bot and records from the original
27 diagnosis of celiac sprue. At the hearing, Plaintiff's attorney said
28 they could try to find the record of the original diagnosis of celiac

1 sprue, but she was not sure they would be able to do so. (Tr. 54.)
2 The ALJ said he was going to keep the record open for 20 days; if the
3 records could be located they were to be submitted. (Tr. 54.)
4 Plaintiff did not submit additional records showing the diagnosis of
5 celiac sprue.

6 The ALJ did not fail to develop the record with regard to celiac
7 sprue for three reasons. First, the diagnosis of celiac sprue is not
8 questioned by the ALJ. Dr. Rullman's testimony establishes that even
9 if celiac sprue is a definitive diagnosis, the condition is
10 controllable with a gluten-free diet. (Tr. 30.) Thus, although Dr.
11 Rullman testified there was no information in the record about the
12 original biopsy or diagnosis of celiac sprue (Tr. 30-31), he opined he
13 did not believe the diagnosis relates to Plaintiff's dominant problem
14 of musculoskeletal discomfort due to fibromyalgia. (Tr. 31.) Dr.
15 Rullman's testimony suggests that the diagnostic information about
16 celiac sprue would have little impact on his opinion, and it would not
17 establish effects of celiac sprue upon Plaintiff's ability to work.
18 As a result, there is no ambiguity for the ALJ resolve by obtaining
19 original diagnostic records regarding celiac sprue.

20 Second, Plaintiff was not able to provide specific information
21 about her original diagnosis. (Tr. 54-55.) She could not remember
22 when the diagnosis was made or the diagnosing physician's name,
23 specialty, or location.² (Tr. 54-55.) Even if the ALJ chose to pursue
24 evidence of the original diagnosis, he had no information from which
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26 ²Plaintiff "figured" that celiac sprue had been diagnosed three
27 years before the hearing, and testified that she might have gotten the
28 diagnosis in Idaho, but "that's a total blank to me." (Tr. 55.)

1 to start. Third, Plaintiff indicated that she would attempt to obtain
2 the records, although she was skeptical they could be located. (Tr.
3 54.) It is elemental that if the Plaintiff assures the ALJ she will
4 pursue certain records, the ALJ would neither be expected to duplicate
5 efforts nor commit error by failing to do so. For these reasons, the
6 ALJ did not err by failing to develop the record with respect to
7 celiac sprue.

8 With respect to the psychological evidence, Plaintiff points to
9 a Psychiatric Review Technique form dated July 26, 2007, signed by
10 Edward Beaty, Ph.D. (Tr. 264-77.) The "Consultant's Notes" attached
11 to the form mention a May 16, 2006, "CE" by Dr. Bot containing
12 diagnoses of probable ongoing alcohol abuse, probable malingering of
13 symptoms with regard to cognition/anxiety and embellishment physical
14 health disorder, and personality disorder, and a GAF score of 60-61.
15 (Tr. 276.) The notes also mention a Mental Residual Functional
16 Capacity form and Psychiatric Review Technique form completed by Dr.
17 Bailey on June 5, 2006, and suggest a psychological evaluation report
18 also was prepared in June 2006. (Tr. 276.) Dr. Bailey evidently
19 assessed some moderate limitations. (Tr. 276.) Neither Dr. Bot's
20 report nor Dr. Bailey's June 2006 records are part of the record.

21 The reference to June 2006 psychological evaluations by Dr. Bot
22 and Dr. Bailey create an ambiguity in the record. The ALJ gave little
23 weight to the opinion of Dr. Beaty, a state consulting psychologist
24 who identified evidence of depression, personality disorder, and
25 history of alcohol abuse and moderate limitations in six categories.
26 (Tr. 260-77.) The ALJ based his rejection of Dr. Beaty's opinion on
27 the testimony of the psychological expert, Dr. Klein, who testified
28 that the record contains no indication of problems related to alcohol

1 and no evidence to substantiate the diagnosis of personality disorder.
2 (Tr. 15, 37-38.) However, it appears that Dr. Beaty's assessment was
3 based in part on two reports which are missing from the record, one of
4 which included diagnosis of probable alcohol abuse and personality
5 disorder. (Tr. 277.) If Dr. Klein and the ALJ had the opportunity to
6 review those reports, they may have made findings similar to Dr.
7 Beaty or given more weight to Dr. Beaty's opinion which includes some
8 moderate limitations. (Tr. 260-62.) Furthermore, the 2006 reports of
9 Dr. Bot and Dr. Bailey are from the relevant period, whereas two other
10 psychological reports considered by Dr. Klein and the ALJ were from
11 2000 and 2001, before the alleged onset date.³ As a result, the ALJ
12 should have further developed the record by obtaining the 2006 reports
13 prepared by Dr. Bot and Dr. Bailey.

14 **3. Step Two**

15 Plaintiff argues the ALJ failed to identify all of Plaintiff's
16 severe impairments and therefore erred at step two. (Ct. Rec. 14 at
17 11-14.) Specifically, Plaintiff argues that celiac sprue and
18 psychological impairments should have been determined to be severe
19 impairments. (Ct. Rec. 14 at 11-14.) At step two of the sequential
20 process, the ALJ must determine whether Plaintiff suffers from a
21 "severe" impairment, i.e., one that significantly limits his or her
22 physical or mental ability to do basic work activities. 20 C.F.R. §
23 416.920(c). To satisfy step two's requirement of a severe impairment,

24
25 ³It is noted that the ALJ rejected Dr. Dalley's December 2000
26 assessment and Dr. Bailey's November 2001 assessment, and Plaintiff
27 has not challenged the ALJ's findings regarding those reports. (Tr.
28 14, 189-205.)

1 the claimant must prove the existence of a physical or mental
2 impairment by providing medical evidence consisting of signs,
3 symptoms, and laboratory findings; the claimant's own statement of
4 symptoms alone will not suffice. 20 C.F.R. § 416.908. The fact that
5 a medically determinable condition exists does not automatically mean
6 the symptoms are "severe" or "disabling" as defined by the Social
7 Security regulations. *See, e.g., Edlund*, 253 F.3d at 1159-60; *Fair*,
8 885 F.2d at 603; *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th Cir.
9 1985).

10 The Commissioner has passed regulations which guide dismissal of
11 claims at step two. Those regulations state an impairment may be
12 found to be not severe when "medical evidence establishes only a
13 slight abnormality or a combination of slight abnormalities which
14 would have no more than a minimal effect on an individual's ability to
15 work." S.S.R. 85-28. The Supreme Court upheld the validity of the
16 Commissioner's severity regulation, as clarified in S.S.R. 85-28, in
17 *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987). "The severity
18 requirement cannot be satisfied when medical evidence shows that the
19 person has the ability to perform basic work activities, as required
20 in most jobs." S.S.R. 85-28. Basic work activities include: "walking,
21 standing, sitting, lifting, pushing, pulling, reaching, carrying, or
22 handling; seeing, hearing, and speaking; understanding, carrying out
23 and remembering simple instructions; responding appropriately to
24 supervision, coworkers and usual work situations; and dealing with
25 changes in a routine work setting." *Id.*

26 Further, even where non-severe impairments exist, these
27 impairments must be considered in combination at step two to determine
28 if, together, they have more than a minimal effect on a claimant's

1 ability to perform work activities. 20 C.F.R. § 416.929. If
2 impairments in combination have a significant effect on a claimant's
3 ability to do basic work activities, they must be considered
4 throughout the sequential evaluation process. *Id.*

5 As explained in the Commissioner's policy ruling, "medical
6 evidence alone is evaluated in order to assess the effects of the
7 impairments on ability to do basic work activities." S.S.R. 85-28.
8 Thus, in determining whether a claimant has a severe impairment, the
9 ALJ must evaluate the medical evidence.

10 **a. Celiac Sprue**

11 Plaintiff points to one piece of medical evidence in arguing that
12 celiac sprue should be a severe impairment. (Ct. Rec. 14 at 13.) Dr.
13 Wu, a rheumatologist, examined Plaintiff on September 20, 2006. (Tr.
14 226-28.) Dr. Wu noted a history of GI symptoms and biopsy-proven
15 celiac sprue disease.⁴ (Tr. 226.) Dr. Wu indicated musculoskeletal
16 problems, low vitamin D levels, peripheral neuropathy, and low vitamin
17 B12 levels, as well. (Tr. 227.) Plaintiff reported adherence to a
18 gluten-free diet for about nine months after she was diagnosed with
19 celiac sprue, but admitted she was no longer on a gluten-free diet.
20 (Tr. 226.) She denied diarrhea or GI symptoms at the time. (Tr.

21
22 ⁴As discussed *supra*, Plaintiff testified she could not recall the
23 name, location, or specialty of the physician who obtained the biopsy,
24 and could not recall the date with specificity. (Tr. 54-55.) The
25 original diagnosis is not part of the record. The medical expert,
26 Dr. Rullman, assumed the diagnosis even though there was no
27 information in the record about the biopsy or original diagnosis.
28 (Tr. 30.)

1 226.) Dr. Wu opined that celiac sprue probably accounted for a large
2 part of Plaintiff's symptoms and encouraged her to adhere to a gluten-
3 free diet, but observed, "she doesn't seem too motivated." (Tr. 227.)

4 The ALJ acknowledged Dr. Wu's report of diagnosis of celiac sprue
5 by biopsy. (Tr. 15.) He also noted Plaintiff's complaints of
6 frequent diarrhea due to sprue in March and June of 2007, and
7 Plaintiff's testimony that she has abdominal pain.⁵ (Tr. 54, 233,
8 238.) However, the ALJ pointed out that Dr. Rullman testified that
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10 ⁵The ALJ determined that Plaintiff's statements concerning the
11 intensity, persistence and limiting effects of symptoms are not
12 credible to the extent inconsistent with the RFC. (Tr. 17.) If the
13 ALJ finds the claimant's testimony as to the severity of her pain and
14 impairments is unreliable, the ALJ must make a credibility
15 determination with findings sufficiently specific to permit the court
16 to conclude that the ALJ did not arbitrarily discredit claimant's
17 testimony. *Morgan v. Apfel*, 169 F.3d 599, 601-02 (9th Cir. 1999). In
18 the absence of affirmative evidence of malingering, the ALJ's reasons
19 must be "clear and convincing." *Lingenfelter v. Astrue*, 504 F.3d
20 1028, 1038-39 (9th Cir. 2007); *Vertigan v. Halter*, 260 F.3d 1044, 1050
21 (9th Cir. 2001); *Morgan*, 169 F.3d at 599. The ALJ "must specifically
22 identify the testimony she or he finds not to be credible and must
23 explain what evidence undermines the testimony." *Holohan v.*
24 *Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001)(citation omitted). The
25 ALJ listed a number appropriate considerations in making the
26 credibility determination which constitute clear and convincing
27 reasons supported by substantial evidence. (Tr. 17-19.) Plaintiff
28 does not challenge the credibility determination.

1 symptoms of celiac sprue are normally controlled with a gluten-free
2 diet. (Tr. 30, 32.) This is supported by Plaintiff's report to Dr.
3 Hubbard, her treating physician, that when she was able to control her
4 eating she controlled her abdominal pain better. (Tr. 251.) The ALJ
5 observed that Plaintiff testified she has had difficulty following a
6 gluten-free diet and Dr. Wu observed a lack of motivation to do so in
7 July 2006. (Tr. 53, 227.) By December 2006, Plaintiff reported 95%
8 compliance with a gluten-free diet and reported no symptoms of
9 diarrhea or stomach pain. (Tr. 211.) Dr. Hubbard noted Plaintiff's
10 celiac sprue was controlled by diet in July 2007. (Tr. 247.) In
11 January 2008, Plaintiff reported to Dr. Luera during her annual
12 physical exam that she cheats on her diet once in a while, but was
13 doing well overall with respect to celiac sprue. (Tr. 312.) When
14 Plaintiff saw Dr. Wu in September 2008, she denied diarrhea or nausea
15 and celiac sprue was not mentioned. (Tr. 338-41.) No physician
16 described limitations due to celiac sprue and few symptoms were
17 reported to Plaintiff's physicians when she was compliant with a
18 gluten-free diet. Substantial evidence supports the ALJ's conclusion
19 that celiac sprue causes no more than a minimal limitation on
20 Plaintiff's ability to perform work activity. Therefore, the ALJ did
21 not err by failing to identify celiac sprue as a severe impairment.

22 **b. Psychological Conditions**

23 Plaintiff argues the ALJ should have included depression, anxiety
24 and panic attacks as severe impairments. Plaintiff notes that Dr.
25 Klein identified depression not otherwise specified at the hearing and
26 on the Psychiatric Review Technique form. (Tr. 41, 385.) Indeed, the
27 ALJ commenced questioning of Dr. Klein by asking whether the record
28 was sufficient and what were his findings. (Tr. 37.) Dr. Klein

1 replied, "It's sufficient, Your Honor. And there is a 12.04
2 depressive disorder not otherwise specified. The other diagnosis that
3 doesn't have a listing associated with it would be malingering." (Tr.
4 37.) Later, Dr. Klein testified that Plaintiff does not meet the "C"
5 criteria, leading to an "impairment not severe" rating on the
6 Psychiatric Review Technique form. (Tr. 41, 382.) Plaintiff also
7 cites a somewhat unclear discussion between Dr. Klein and the ALJ as
8 to the meaning of Dr. Klein's "not severe" assessment. (Tr. 41-42.)
9 The ALJ stated, "the way you filled it [the PRT form] out was at not
10 severe, but that not severe goes to not step two, but to basically
11 steps four and five, so I'll just . . . take judicial notice of that."
12 (Tr. 42.) However:

13 The psychiatric review technique described in 20 C.F.R.
14 404.1520a and 416.920a and summarized on the Psychiatric
15 Review Technique Form (PRTF) requires adjudicators to assess
16 an individual's limitations and restrictions from a mental
17 impairment(s) in categories identified in the "paragraph B"
18 and "paragraph C" criteria of the adult mental disorders
19 listings. The adjudicator must remember that the
20 limitations identified in the "paragraph B" and "paragraph
21 C" criteria are not an RFC assessment but are used to rate
the severity of mental impairment(s) at steps 2 and 3 of the
sequential evaluation process. The mental RFC assessment
used at steps 4 and 5 of the sequential evaluation process
requires a more detailed assessment by itemizing various
functions contained in the broad categories found in
paragraphs B and C of the adult mental disorders listings in
12.00 of the Listing of Impairments, and summarized on the
PRTF.

22 SSR 96-8p. The ALJ seems to have misstated the meaning of Dr. Klein's
23 "impairment not severe" determination at the hearing.

24 However, the ALJ's decision contains a proper step two analysis
25 of Dr. Klein's finding of no severe impairment. (Tr. 15-17.) The
26 regulations provide that functional limitations will be rated in four
27 broad areas: activities of daily living; social functioning;
28 concentration, persistence or pace; and episodes of decompensation.

20 C.F.R. §§ 404.1520a(c)(3), 416.920a(c)(3). If the degree of functional limitations in the first three functional areas is rated as "none" or "mild" and "none" in the fourth area, the impairment is generally considered not severe, unless the evidence otherwise indicates that there is more than a minimal limitation in the ability to do basic work activities. 20 C.F.R. §§ 404.1520a(d)(1), 416.920a(d)(1). Dr. Klein's specific findings include: no restrictions in activities of daily living; mild limitation in maintaining social functioning; mild limitation in maintaining concentration, persistence or pace; and no episodes of decompensation. (Tr. 41.) These are consistent with a finding of "not severe" at step two. These factors, along with other substantial evidence, were properly identified and considered by the ALJ in the step two analysis of depression. (Tr. 13-15.) As a result, the ALJ did not err by failing to include depression as a severe impairment at step two.

4. Step Five

Plaintiff argues the ALJ improperly relied on the grids at step five. (Ct. Rec. 14 at 17-18.) The grids are an administrative tool the Commissioner may rely on when considering claimants with substantially uniform levels of impairment. *Burkhart v. Bowen*, 856 F.2d 1335, 1340 (9th Cir. 1988). However, the use of the grids is not always proper. If a claimant has non-exertional limitations⁶ that

⁶Nonexertional limitations are "all work-related limitations and restrictions that do not depend on an individual's physical strength." Soc. Sec. Rul. 96-8. See also 20 C.F.R. Pt. 416.969a; *Derosiers v. Secretary of Health and Human Serv.*, 846 F.2d 573, 579 (9th Cir. 1988).

1 significantly limit her range of work, the use of the grids in
2 determining disability is inappropriate. *Bates v. Sullivan*, 894 F.2d
3 1059 (9th Cir. 1990), overruled on other grounds by *Bunnell v.*
4 *Sullivan*, 947 F.2d 341, 347 (9th Cir. 1991). In such instances, a
5 vocational expert must be called to identify jobs that match the
6 abilities of the claimant, given her limitations. See, e.g.,
7 *Magallanes v. Bowen*, 881 F.2d 747, 756 (9th Cir. 1989). Nevertheless,
8 if an ALJ determines that a claimant's non-exertional limitations do
9 not significantly affect her ability to perform a full range of work,
10 then use of the grids is appropriate. *Hoopai v. Astrue*, 499 F.3d
11 1071, 1075 (9th Cir. 2007); *Tackett v. Apfel*, 180 F.3d 1094, 1101 (9th
12 Cir. 1999). In this case, the ALJ determined Plaintiff has no non-
13 exertional limitations. Plaintiff's argument depends upon a finding
14 of psychological impairments which affect her ability to perform a
15 full range of work. On remand, after reevaluation of the evidence
16 consistent with the contents of this order, the ALJ should also review
17 the rest of the sequential evaluation process and apply the grids or
18 call a vocational expert, as is appropriate based on new findings, if
19 any.

20 CONCLUSION

21 Having reviewed the record and the ALJ's findings, the court
22 concludes the ALJ's decision is not supported by substantial evidence
23 and is based on legal error. On remand, the ALJ should consider the
24 lay witness evidence and develop the record regarding the 2006
25 psychological assessments by Dr. Bot and Dr. Bailey. If necessary,
26 the ALJ may take additional testimony from a psychological expert and
27 reevaluate the sequential process as appropriate after considering
28 such evidence. Accordingly,

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is **GRANTED**. The matter is remanded to the Commissioner for additional proceedings pursuant to sentence four 42 U.S.C. § 405(g).

2. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is **DENIED**.

3. An application for attorney fees may be filed by separate motion.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and the file shall be **CLOSED**.

DATED April 20, 2011.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE